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IN THE

Supreme Court of the United States

EBAY, INC.,

Petitioner,

v.

MERCEXCHANGE, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMERICA ONLINE, INC., APPLIED MATERIALS, INC., CHEVRON CORPORATION, CISCO SYSTEMS, INC., GOOGLE INC., SHELL OIL COMPANY, AND VISA U.S.A. INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE* [1]

Amici are leading providers of goods and services in several different industries. The goods that they manufacture, distribute, and use to provide services contain numerous subsidiary components, many of which are patented. In addition, the processes used to make these components, and to produce *amici*'s final products, are often themselves patented.

As holders and licensees of valuable patents that are integral to their business, *amici* are keenly aware of the need for effective remedies against infringement, and we strongly support the availability of injunctive relief in appropriate cases. At the same time, however, *amici* are also frequently the subject of patent suits, including many frivolous or abusive ones brought in hopes of coercing lucrative settlements. Because *amici* cannot predict on which side of the caption their next patent suits will find them, we are interested in ensuring that the remedial rules governing patent cases are fair to both plaintiffs and defendants.

Amicus America Online, Inc. ("AOL") is a leader in providing Internet products and services. Operator of the largest online community in the world, AOL provides interactive services, web brands, Internet technologies and e-commerce services. It uses software to provide many of these services, including the AOL, Netscape, and Compuserve browsers, as well as the AIM and ICQ instant messenger programs. AOL holds many patents related to its software and services.

Amicus Applied Materials, Inc. is a leader in the computer and information infrastructure industry. It is the world's largest supplier of products and services to the global semicon-

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[1] Counsel for both parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *amici* and their counsel has made any monetary contribution to the preparation and submission of this brief. *See* Rule 37 & 37.6.

ductor industry. It frequently is responsible for innovations in the processing and manufacturing technology that helps semiconductor manufacturers produce the world's most advanced chips and LCD flat panel displays. Even the most basic of these manufacturing systems contains dozens of patented and patentable elements.

Amicus Cisco Systems, Inc. is a recognized leader in Internet technology. It sells software, hardware such as routers and switches, and services that together provide fast, durable, and secure networks over the Internet for business, education, government, and home communications. These products also incorporate many patented components and processes.

Amicus Google Inc. is a global technology leader whose mission is to organize information and make it universally accessible and useful. Google maintains one of the world's largest online indices of websites and other content, which is freely available to anyone with an Internet connection. Its automated search technology helps people obtain nearly instant access to relevant information from its vast online index, and its AdWords program provides targeted, online advertising for the products and services of its partners. In providing these products and services, Google uses many patented technologies.

Amici Chevron Corporation and Shell Oil Company are leaders in the energy industry. Chevron explores for and produces oil and natural gas, including complex deep water exploration and production in the Gulf of Mexico and around the world. Chevron also transports natural gas in the United States through pipeline systems and liquefied natural gas around the world in special tankers; refines oil into fuels, lubricants, and base chemicals; and develops several advanced energy technologies such as fuel cells, hydrogen storage and gas-to-liquid products. *Amicus* Shell engages in similar exploration, production, refinement, and transportation activities. In addition, Shell develops and employs

technologies relating to wind energy generation, solar photovoltaic, and other alternative energy sources including biofuels, geothermal and hydrogen. The activities of both Chevron and Shell involve multiple complex processes, nearly all of which are subjects of numerous patents, owned either by *amici* or third parties. In addition, the products manufactured and sold by Shell and Chevron frequently contain patented components, such as additive packages.

Amicus Visa U.S.A. Inc. is part of a worldwide association of more than 21,000 financial institutions that individually offer Visa-brand payment services, including Visa-brand credit cards. These services include an extensive system for approving and processing charges involving millions of merchants and cardholders as well as thousands of banks every day. Multiple components of this system, including a range of business methods and technological features, consist of or contain patented elements.

Amici are troubled by the Federal Circuit's ruling below that a plaintiff is virtually always entitled to injunctive relief whenever it shows patent infringement—without regard to the equities of the individual case. This decision concerns *amici* because the rigid rule below might force courts to grant unnecessary and grossly inequitable relief, especially when applied to complex goods and services. Because such relief creates potentially huge windfalls for patent owners, the rule will likely encourage an increase in abusive patent litigation, which burdens the courts and undermines the goals of the patent system. Accordingly, *amici* urge the Court to take this case to reverse the ruling below and to restore a fairer, more flexible standard for injunctive relief in patent infringement cases.

SUMMARY OF ARGUMENT

The Federal Circuit's decision to require injunctions virtually automatically upon a finding of patent infringement

departs radically from the traditional standard governing injunctive relief. Although Congress specifically authorized courts to issue injunctions in patent cases, it did not require courts to impose injunctions automatically upon a finding of infringement. To the contrary, the Patent Act provides that courts "*may*" grant injunctive relief "in accordance with the principles of equity." 35 U.S.C. § 283 (emphasis added).

Traditionally, courts have interpreted this statutory language to confer the same equitable discretion in patent cases that is enjoyed in other types of cases. *See, e.g., Foster v. Am. Mach. & Foundry Co.*, 492 F.2d 1317, 1324 (2d Cir. 1974) ("An injunction to protect a patent against infringement, like any other injunction, is an equitable remedy to be determined by the circumstances."). Although the Federal Circuit initially appeared to recognize this discretion,[2] in the decision below it held that, upon a finding of patent infringement, courts must grant injunctive relief absent an overriding public interest. It thus deprived courts of any discretion to consider the private equities in the case.

Amici wholeheartedly agree with Petitioners that the proper standard for patent injunctions is an issue of exceptional importance warranting this Court's attention, that the Federal Circuit's rigid rule is wrong, and that a more flexible standard should be employed. Pet. at 13-22, 25-27. We submit this brief to highlight the deleterious effects that the Federal Circuit's rigid rule would have on providers of complex goods and services, as well as the court system, if left in place by this Court.

By effectively eliminating equitable discretion over injunctive relief, the decision below opens the door to grossly inequitable injunctions that will exacerbate the growing prob-

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[2] *See Roche Prods., Inc. v. Bolar Pharm. Co.*, 733 F.2d 858, 865 (Fed. Cir. 1984), *superseded on other grounds by statute*, 35 U.S.C. § 271(e), *as recognized in W.L. Gore & Assocs. v. C.R. Bard, Inc.*, 977 F.2d 558 (Fed. Cir. 1992).

lem of abusive patent litigation. Of particular concern to *amici* are those instances in which a court will be compelled to grant injunctive relief based upon infringement by a minor element of a complex good or service. Such injunctions can impose enormous costs wholly unrelated to the value of the patent infringed because they force manufacturers to retool entire complex processes. Appellate review is inadequate to prevent these costs because an injunction might be in place for years before a wrongfully decided infringement, validity, and/or claim construction determination is reversed. The threat of such costs will enable unscrupulous plaintiffs, many of whom are well-financed and experienced patent litigants, to leverage patents of little or no value into massive settlements. The automatic injunction rule hands a powerful club to such litigants, inviting abusive patent litigation.

The adverse impact of the automatic injunction rule cannot be overstated. The courts are already overstretched by the rise of professional patent litigants and the related increase in patent litigation over the last two decades. By making otherwise frivolous litigation economically attractive and escalating the potential recovery in other cases, the rule adopted below will profoundly exacerbate this problem. Defending against the abusive litigation encouraged by the decision will further divert resources that could be used to develop innovative new products and processes, and distort the focus of the research that does take place, undermining the very innovation that patent law is intended to promote.

These costs are entirely avoidable if courts are permitted to continue to weigh the equities in considering injunctive relief in patent cases as they do in other cases and as Congress has expressly instructed them to do in patent cases. Accordingly, *amici* respectfully urge this Court to review the decision below, reject its rigid rule, and adopt a more flexible standard for patent injunctions.

ARGUMENT

THE FEDERAL CIRCUIT'S DETERMINATION THAT INJUNCTIVE RELIEF MUST ISSUE WHENEVER A PATENT HAS BEEN INFRINGED RAISES A QUESTION OF THE UTMOST IMPORTANCE

A. The Federal Circuit's Rigid Rule Will Force Courts to Issue Grossly Inequitable Injunctions, Especially in Connection with Complex Goods and Services

In the decision below, the Federal Circuit reversed the trial court's denial of an injunction, which the trial court had based on weighing the equities of the case. The Federal Circuit held that the plaintiff was "entitled," and had a "right," to injunctive relief. App. 27a. This rule requiring injunctive relief whenever a patent has been infringed conflicts with the Patent Act, which expressly instructs courts to grant injunctive relief "in accordance with the principles of equity." 35 U.S.C. § 283.

Patent injunctions are potent remedies. They can force a defendant to shut down a production line or withdraw a product from the market altogether, with potentially calamitous results. *See, e.g.*, Adam B. Jaffe & Josh Lerner, INNOVATION AND ITS DISCONTENTS 113-14 (2004) (noting that, due to the injunction in the Kodak instant camera case, 4,500 employees lost their jobs and $200 million of plant, property, and equipment were rendered obsolete). When infringement is found, this harsh medicine is often warranted. But there are many instances when it is not. Of primary concern to *amici* are potential injunctions that would prevent the use of a product or service when the patent in question covers only a minor element of the product or service. The Federal Circuit's rigid rule provides no exception for such cases. In such cases, the decision below compels courts to issue grossly inequitable injunctions.

The direct benefits to the patent holder of an injunction against the use of a minor element of a product will often be quite small. Complex goods and services contain numerous components. Although some of these components are central to those products and quite valuable, others serve only a minor function and could be replaced by other products or processes. Patents covering such minor elements are unlikely to be particularly valuable because of the availability of non-infringing alternatives. Indeed, precisely for this reason, the vast majority of patents have little or no value. *See, e.g.*, William Landes & Richard Posner, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 320 (2003) (noting that over 95% of patents are unlicensed and 97% generate no royalties).

Nevertheless, the burden imposed by an injunction against the use of such minor patents might be enormous. Even where it is relatively easy to design a new replacement element, the cost of incorporating that new element into the larger manufacturing process may be huge. For example, a facility for producing computer chips can cost more than $1 billion to build and equip. *See* Rosemarie Ziedonis, *Patent Litigation in the U.S. Semiconductor Industry* in PATENTS IN THE KNOWLEDGE-BASED ECONOMY 191 (Wesley M. Cohen & Stephen A. Merrill, eds., 2004). To prevent dust and other microscopic impurities from contaminating them, computer chips must be produced in "clean" rooms with entirely self-contained environments. In addition, because toxic chemicals are used in etching the chips, their production facilities must have sophisticated ventilation systems and other safety devices integrated into them. As a consequence, even if it is easy to design a replacement for a component of the product or a process used in those facilities, the cost of "retooling" and inserting the new component can be tremendously expensive.

Similarly, many manufacturing processes now use process-control systems based on information technology. These systems contain small controllers and other components that are manufactured for incorporation into larger process-control systems. These components have relatively little market value. The systems into which they are integrated are, however, so intertwined with manufacturing processes that their removal because of a patent injunction can shut down the entire manufacturing process. Moreover, because these controllers are themselves complex products, they might have multiple components and processes potentially subject to infringement claims.

Even if a new minor component can be integrated into a complex product or service in response to a patent injunction, launching and testing it can be quite expensive. For example, a change in semiconductor manufacturing equipment, even if small, might require re-qualification of the equipment by most or all of the customers using that equipment, which can take months of work by each customer to make sure the change does not affect the quality of the customer's final product. The manufacturer also must make sure that the newly revised product is safe and that it remains compatible with the rest of a manufacturer's products and industry standards. For example, with software, a new subroutine cannot simply be substituted for an older infringing one. The different subroutines in large software programs frequently have unexpected interactions with each other, and it is therefore necessary to spend considerable time "debugging" software programs before releasing them to the public. *See, e.g.*, James Bessen, *Open Source Software: Free Provision of Complex Public Goods* at 5 (2004) (noting that most of the cost of software "arises from testing, debugging, and consumer maintenance (that is, fixing bugs or providing work-arounds after product release)"), http://www.researchoninnovation.org/opensrc.pdf (last visited Sept. 22, 2005).

The delay associated with incorporating a new element into an existing product to respond to a patent injunction can also can be overwhelmingly expensive. During the time it takes to install new equipment on a production line or debug new software, a manufacturer might lose significant sales to its competitors. In addition, the manufacturer might be forced to recall and replace infringing products used by its consumers. Even worse, if customers blame the disruption on the manufacturer, the goodwill that the manufacturer has built up might be lost, thereby damaging not only sales of the enjoined good but also the company's overall reputation. *See* Samson Vermont, *The Economics of Patent Litigation*, in FROM IDEAS TO ASSETS: INVESTING WISELY IN INTELLECTUAL PROPERTY 350 (B. Berman ed., 2002). Indeed, the manufacturer might be subjected to class actions by consumers complaining that they were prevented from using the infringing goods. *See, e.g.*, *Instant Camera Settlement*, http://www.kodak.com/cluster/global/en/service/faqs/faq0098.shtml (last visited Sept. 8, 2005) (noting class action lawsuit brought in light of the injunction issued against the Kodak instant camera).

Those costs of compliance are not mitigated by the possibility of overturning the underlying judgment on appeal. Appeals in patent cases can take several years, and injunctions are not automatically stayed pending appeal. *See* Fed. R. Civ. P. 62(a). Even when an injunction is stayed, the possibility of injunctive relief might chill investment and innovation. Indeed, in many instances the costs of an injunction might prove too high for a company to pursue appellate review.

The burdens imposed by the patent injunctions made mandatory by the decision below thus can be grossly inequitable. Although the burdens of retooling a product might be justified when the infringed patent covers some innovation at the core of the product, the burden on the defendant will

vastly outweigh the plaintiff's interest when the injunction is based upon a minor element that adds only minor value to the product. This is especially true where, as in the underlying case, the plaintiff neither practices the patent itself nor attempts to persuade others to use it, and therefore has little equitable claim to an injunction in addition to the remedy of damages for any future infringing use. Indeed, issuing injunctions under such conditions will often give a patent holder a significant windfall, for a rational manufacturer will strongly consider settling to avoid or vacate an injunction and obtaining a license for a sum that is less than the cost imposed by the injunction but more than the fair value of the patent.

B. The Injunctions Mandated by the Decision Below Will Exacerbate the Growing Problem of Abusive Patent Litigation

By virtually guaranteeing an injunction in every case in which the plaintiff proves infringement, and thereby enabling plaintiffs to leverage patents of little value into lucrative settlements, the Federal Circuit's rigid rule exacerbates the already serious problem of abusive patent litigation.

Several aspects of patent litigation make it particularly conducive to frivolous or abusive litigation. *See, e.g.*, Michael J. Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C. L. REV. 509, 512-20 (2003). In the first place, patent cases are difficult to assess and therefore uncertain. Due to the complexity of claim construction, the heavy reliance upon expert testimony, and the difficulty juries have assessing evidence of infringement, patent defendants can rarely be entirely sure of victory, irrespective of the strength of their defenses. *See id.* at 513-14. In addition, patent plaintiffs have an initial advantage in assessing the merits of their claims because, unlike their adversaries, they often know of prior art or other factors likely to preclude relief. *See id.* at 514-15. Finally, patent litigation is extremely expensive. The "industry rule of

thumb" is that "any patent infringement lawsuit will easily cost $1.5 million in legal fees alone to defend." Wendy H. Schacht & John R. Thomas, CONGRESSIONAL RESEARCH REPORT: PATENT REFORM: INNOVATION ISSUES 7 (2005) [hereinafter PATENT REFORM] (internal citations omitted).

Moreover, high stakes patent litigation is even more costly: for patent suits involving damage claims of more than $25 million, expenses can increase to $4 million per side. *See id.* at 7; *see also* Jaffe & Lerner, INNOVATION AND ITS DISCONTENTS at 14 (noting the indirect costs of patent litigation). As a result of these factors, many companies are wary of litigating patent cases and will readily settle such claims for anything less than the perceived cost of litigation, especially when their adversary is aggressive and well financed. *See id.*; Meurer, *supra*, 44 B.C. L. REV. at 516-17.

Well aware of these dynamics, a new class of professional patent litigants has appeared in recent years. *See* PATENT REFORM at 9 (recounting the rise of these non-practicing entities (NPEs) and explaining why they are also often called "patent trolls"). These litigants do not seek to develop new products based on their patents or enter into licenses with companies that want to develop the innovations covered by those patents. Instead, they seek out companies that have independently developed the same innovations and then either sue them or extort licenses out of them based upon the threat of suit.

For example, the late Jerome Lemelson, a prolific obtainer of patents and frequent plaintiff (but not connected with this action), asserted that one of his patents covered the bar codes widely used on commercial products. Rather than suing companies that market and manufacture bar-code readers, Lemelson sued companies that simply used these machines, typically settling for an amount just under the expected cost of litigation. *See* Nicholas Varchaver, *The Patent King*, FORTUNE, May 14, 2001, at 214-16. In this way, he earned

hundreds of millions of dollars in licensing fees. *See id.* Eventually, however, the bar-code reader manufacturers sued Lemelson, litigated the case through trial, and obtained a judgment that Lemelson's patents were unenforceable. *See Symbol Techs., Inc. v. Lemelson Med., Educ., & Research Found., Ltd., P'ship*, 301 F. Supp. 2d 1147 (D. Nev. 2004), *aff'd*, No. 04-1451, 2005 WL 2173572, at *1 (Fed. Cir. Sept. 9, 2005).

Other repeat patent litigants focus upon buying dormant, unexploited patents. *See* Stephen A. Merrill, *et al.* eds., A PATENT SYSTEM FOR THE 21ST CENTURY 31 (2004); James Bessen & Michael Meurer, *Lessons for Patent Policy from Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. 1 (2005). For example, the Acacia Technologies Group, which controls more than 120 patents, describes itself as a company that "develops, acquires, and licenses patented technologies." Acacia Technologies Group, "About Us," http://www.acaciaresearch.com/aboutus_main.htm (last visited Sept. 8, 2005). It employs more lawyers and accountants than engineers, and its engineers reportedly evaluate rather than develop technologies. *See* Steven M. Cheery, *Company Profile: The Patent Profiteers*, IEEE SPECTRUM, June 2004, at 38-41; *see also* Danny Fortson, *The Big Squeeze*, IP LAW & BUS., Nov. 2004, at 19 (discussing Intellectual Ventures); John Markoff, *Auction of Internet Commerce Patents Draws Concerns*, N.Y. TIMES, Nov. 16, 2004, at C4 (discussing JGR Acquisitions Inc.). Other frequent patent litigants are failed market participants who turn to litigation after unsuccessfully attempting to commercialize their patents. *See* Kirk L. Kroeker, *Forgent Sues 31 Companies for JPEG Royalties*, TECHNEWSWORLD, Apr. 23, 2004, http://www.technewsworld.com/story/33518.html last visited Sept. 9, 2005) (discussing Forgent Networks).

The Federal Circuit's automatic injunction rule will provide powerful encouragement for these professional patent

litigants. By essentially guaranteeing injunctive relief upon a finding of infringement, no matter how minor the patent, the rule adopted below gives them a weighty club with which to back up their shake-down threats, thus creating the prospect of even more lucrative settlements and rendering abusive claims even more attractive. *See, e.g.*, Jaffe & Lerner, *supra*, at 111; Ziedonis, *supra*, at 191.

In addition, the Federal Circuit's rule gives plaintiffs an incentive to bring claims based upon patents with little or no value. When a patent has little value, and its owner does not attempt to practice it or attempt to persuade others to practice it, the damages the patent holder may receive will normally be limited to the fair value of the royalties that would have been earned by a license negotiated prior to any infringement. *See Maxwell v. J. Baker, Inc.*, 86 F.3d 1098 (Fed. Cir. 1996); *see also Hebert v. Lisle Corp.*, 99 F.3d 1109, 1119 (Fed. Cir. 1996) ("When the patentee does not seek to make and sell the invention, lost profits are not an appropriate measure of damages."). For a low-value patent, these damages will be minimal and therefore not worth the cost of litigation. By essentially guaranteeing injunctive relief to successful patent plaintiffs, the Federal Circuit's automatic injunction rule changes the game. This is because the burden imposed by the injunctive relief that the rule requires creates a prospect of lucrative settlements that are wholly separate from the intrinsic value of the patent. In short, by creating an independent economic incentive to bring infringement claims based upon patents that are themselves of low value or that play only a minor role in complex products or services, the decision below encourages abusive litigation.

C. The Abusive Litigation Encouraged by the Decision Below Will Unnecessarily Burden Already Overstretched Courts and Undermine the Primary Goal of the Patent System

The abusive litigation encouraged by the Federal Circuit's automatic injunction rule burdens both the administration of justice and the operation of the patent system.

The automatic injunction rule burdens an already overstretched court system by making otherwise frivolous litigation economically attractive and escalating the potential recovery in other cases. Over the last decade, the number of patent suits has increased sharply. In 1994, approximately 1,600 patent suits were filed; ten years later filings exceeded 3,000 suits—an increase of nearly 90% percent, nearly six times the overall increase in civil cases. *See* Annual Reports of the Administrative Office of the U.S. Courts from 1997-2004, http://www.uscourts.gov/judbususc/judbus.html (last visited Sept. 8, 2005). Moreover, the burden of these patent cases is disproportionately greater than their numbers suggest. As the high cost of such suits indicates, *see supra* p. 11, patent litigation is especially contentious and rife with disputes and motion practice requiring court supervision and resolution. Patent infringement cases also have extensive and hotly contested claim-construction hearings, which have no parallel in other civil litigation. Due to the high stakes, when patent cases are litigated, they are more likely than other cases to go to trial. *See, e.g.*, Bessen & Meurer, *Lessons from Patent Policy for Empirical Research on Patent Litigation*, 9 LEWIS & CLARK L. REV. at 2-3 (noting that patent cases go to trial at twice the overall rate for civil suits). Finally, patent trials tend to be lengthy: almost 10% of patent trials require 20 or more days of trial, compared to less than 1% of all civil cases, and it is not unusual for a patent trial to last for several months. *See, e.g.*, M. Patricia Thayer *et al.*, *Examining*

Reexamination: Not Yet An Antidote To Litigation, 5 SED. CON. J. 23, 26 (2004).

The Federal Circuit's rigid injunction rule will further exacerbate the already serious burden that patent litigation imposes on judicial resources. Although no separate figures detail what portion of the huge increase in patent suits over the last decade is due to professional patent litigants, their simultaneous rise is not mere coincidence. By providing additional incentives to sue, and by making abusive litigation based upon low-value patents economically viable, the rule deepens this already serious challenge to the administration of justice.

By encouraging abusive litigation, the automatic injunction rule also adversely affects the patent system and business operations. First, the litigation encouraged by the rule diverts resources that might be more productively used to develop and improve products. Every dollar spent defending against patent suits, especially abusive ones based upon dubious claims and patents of little value, is a dollar that could be spent more productively on research and development. Moreover, the money spent actually litigating patent cases represents only the tip of the iceberg. Professional patent plaintiffs make most of their money by simply threatening to bring litigation and thereby coercing licensing fees. *See supra* p. 10-13. Thus, by encouraging abusive litigation, the automatic injunction rule saps resources that would otherwise be available for research and innovation.

Second, the risk of litigation colors and distorts business operations. For smaller firms, the risk of litigation is a major consideration in deciding whether to engage in research and development. Aware that they cannot afford the time and expense of patent litigation, many smaller companies reduce or alter their research and development efforts. *See* Jaffe & Lerner, *supra* at 15; Meurer, *Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation*, 44 B.C.

L. REV. at 518. The research and development decisions of larger companies are affected as well. To avoid patent litigation, these companies often seek patents that they would not otherwise prosecute, thereby reducing the funds available for additional research and development. *See* Jaffe & Lerner, *supra* at 58; Ziedonis, *supra* at 181-83. In addition, such companies are also deterred from pursuing smaller innovations, though they may be promising or efficient, because it is safer to use old components and processes that are clearly in the public domain or for which they already own the patents. Thus, the threat of abusive litigation chills innovation.

These consequences effectively turn the patent system on its head. The Constitution authorizes Congress to enact patent laws to "promote the Progress of Science." U.S. Const. art. I, § 8, cl. 8. As this Court has repeatedly recognized, the goal of patent law is to encourage innovation and bring new designs and technologies into public use. *See, e.g., Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (noting that patent law "seeks to foster and reward invention to stimulate further innovation"); *see also Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 401 (1911) ("The purpose of the patent law is to stimulate invention."). The automatic injunction rule does not encourage patent holders to exploit their inventions or encourage others to do so to the benefit of the public. Quite the contrary, it allows patent holders to lie low while others invest time and money in independently discovering their invention, developing it, and incorporating it into a successful product. Then, the patent holder can spring into action to extract a license fee commensurate with the time and money the manufacturer has invested. Far from encouraging innovation, this threat leads companies to divert funds that might otherwise be used for research and development into defensive patents and litigation or settlement costs and thereby "disrupts the ongoing process of innovation." Jaffe & Lerner, *supra*, at 58. Thus,

the Federal Circuit's automatic injunction rule undermines the patent system's core goal of promoting innovation.

There is no need to interpret the Patent Act in such a counterproductive fashion. The incentive for abusive litigation created by the automatic injunction rule could be dramatically reduced by restoring a more flexible test for patent injunctions that would be in keeping with the plain language of the Patent Act and traditional equitable practice. Courts could prevent the unfair windfalls created by the automatic injunction rule if they were permitted to consider equitable factors such as the burden an injunction imposes upon a defendant, the relative value of the patented product or process, whether the plaintiff has sought to practice the patent in issue, and whether the plaintiff has sought to license the patent widely, selectively, or not at all. Likewise, removing the guaranteed promise of an injunction would reduce the leverage of pre-litigation threats and thus the incentive for abusive litigation.

Moreover, the heavy burdens imposed by the Federal Circuit's rule are not necessary to ensure that adequate injunctive relief against patent infringement is available. Courts have long been tasked with weighing the equities where injunctive relief has been requested, and there is no reason to believe that they cannot do so in patent cases. Certainly the Patent Act does not suggest so. Quite the contrary, the Act specifically recognizes that patent injunctions should only be issued "in accordance with the principles of equity." 35 U.S.C. § 283. Thus, the burdens imposed by the Federal Circuit's automatic injunction rule upon both the courts and the economy can be alleviated by simply following the plain language of the Patent Act and adopting the traditional flexible approach towards injunctive relief. Such an approach would continue to provide effective remedies for patent infringement, including injunctive relief, while also providing a needed safety valve when the equities warrant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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